9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 960

J. C. PATTERSON ET AL., *Petitioners*

vs.

THE TEXAS COMPANY, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HERBERT S. GARRETT,
DURWOOD H. BRADLEY,
WALTER D. WILSON,
Attorneys for Respondent,
The Texas Company.

INDEX

CASES CITED:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 960

J. C. PATTERSON ET AL, *Petitioners*

vs.

THE TEXAS COMPANY, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

I.

OPINION BELOW

The opinion of the Circuit Court of Appeals, by Judge Hutcheson, is found in 131 Fed. (2d) 998, and at pages 481, 486 of the printed Record.

II.

JURISDICTION

The petition seeks to claim that the Circuit Court of Appeals has decided, in conflict with applicable local decisions and a decision of the Circuit Court of Appeals for the Tenth Circuit on the same matter, the question of local law of Texas as to what constitutes royalty for an oil and gas lease on Texas land.

This claim is not supported by the record.

III.

STATEMENT OF THE CASE

The petition for certiorari distinctly leaves the impression, if it does not directly assert, that a part of the $441,445.72 was bonus for leases on the land in controversy. The truth is that no part of the $441,445.72 was bonus for leases on the land in controversy —indeed, it was neither bonus nor royalty for leases on any land for that matter. The petition leaves the inference that the Circuit Court of Appeals deprived petitioners of a share of said $441,445.72 by holding that cash money paid for an oil and gas lease on Texas land is *royalty*. The Court did not make any such holding. Petitioners never had the slightest interest in said money and that ended the matter.

The land in controversy, which we hereafter call the "Patterson land", consists of Sections 856 and 900 and the North one-half of Section 901, Block D, John H. Gibson Survey, Yoakum County, Texas. R. 37.

The said sum of $441,445.72 was paid for improvements on other land than the Patterson land; it simply represented the cost of these improvements. Neither the improvements nor the money had anything to do with the Patterson land. Petitioners have no interest in this other land or in said improvements or in said money. Petitioners never had the slightest claim to this money or any part thereof. Leases on the Patterson land had no bonus value and no bonus was paid for such leases. All this is made perfectly plain by the record; there can be no question about it. The answer of respondent made it perfectly clear. R. 52-

62. It was established by ample and undisputed testimony; Wynne, President Aloco Oil Company, R. 110-125; Cole, Manager for respondent, R. 197, 299, 203, 206-209, 219-221, 221-267. The jury found it, Verdict of Jury, R. 87-89. The Circuit Court of Appeals said, R. 483, 131 Fed. (2d) 1000:

> "There were jury findings fully supported by the evidence; that the $441,445.72 paid The Texas Company by Aloco was not bonus but consideration for the 17 completed oil wells on lands other than plaintiffs'; that no bonus was paid for the leases on plaintiffs' land; and that they were without bonus value."

Again, footnote R. 483; 131 Fed. (2d) 1000:

> "It was established by uncontroverted proof that the $441,445.72 stated in the agreement as consideration, was not a bonus for making any of the leases, but was consideration for the improvements which had been placed by The Texas Company on certain tracts of leased lands and represented the cost of drilling 17 wells plus the expense of operating them to December 31, 1938, minus the value of the oil which The Texas Company had already obtained from the wells up to that time."

And again the Circuit Court of Appeals said, R. 485, 131 Fed. (2d) 1001:

> "Upon a full and fair charge and on evidence fully sustaining the verdict, the issue the pleadings presented, whether a cash bonus was paid for the Patterson leases, was submitted to the jury and found against plaintiffs. In addition,

the jury found that the Patterson leases had no cash bonus value. If, therefore, appellants' alternative position, that if no bonus was received appellee was bound to obtain reasonable bonus value for the leases and was liable to them for that value though not received by it, was well taken, and we by no means hold that it was (compare Cowden v. Broderick, 131 Tex. 434; Cullum v. Ford Motor Co., 107 Fed. (2d) 945; and Deeds v. Deeds, 196 Pac. 1109), appellant could not complain of the judgment, for the jury, on evidence supporting its finding, found that they had no cash value. In the face of these findings that no cash bonus was received for the leases and that they had no cash bonus value, it would be in complete contradiction of the verdict for the court to award plaintiffs a recovery."

———o———

The petition for certiorari implies, if it does not plainly charge, that the Circuit Court of Appeals held that if the Aloco Oil Company should drill wells on the Patterson land in the future, then the $3500 to be paid by Aloco Oil Company for each well drilled would constitute *royalty* for the leases on the Patterson land. Not so: the Circuit Court of Appeals recognized that the $3500 to be paid by Aloco for each paying well drilled by Aloco on the Patterson land constitutes a deferred, contingent bonus for the lease on the Patterson land—deferred because it will not be paid until in the future, if at all; contingent because the wells may never be drilled or, if drilled, may not produce oil in paying quantities, hence it may never be paid.

The Circuit Court of Appeals said, R. 483, footnote, 131 Fed. (2d) 1000:

> "Among the provisions of the assignment agreement was one for payment of rentals and for a contingent bonus of $3500.00 for each well drilled on each particular tract or tracts."

Again the Court said, R. 484, 485, 131 Fed. (2d) 1000, 1001:

> "The instrument by which plaintiffs sold is without ambiguity or need for construction. It plainly and clearly reserves to plaintiff a royalty interest and as plainly and clearly provides that if grantee, its successors or assigns, obtains a bonus for leasing the minerals, plaintiffs shall have one-fourth thereof. It as plainly and clearly provides, though that no obligation to lease the land or obtain a bonus is imposed, and leaves to the discretion of grantee whether, and the terms upon which, the land should be leased. It clearly gives plaintiffs a one-fourth interest in any bonus which may be reserved, and plaintiffs are, therefore, entitled to inquire and have determined in connection with any leasing made of the land what the true facts are. The Texas Company could not, therefore, by any form of agreement, have prevented plaintiffs from obtaining its share of a bonus if one was reserved, nor could plaintiffs claim a bonus on their land under instruments executed by The Texas Company, no matter what the terms of those instruments if, in fact, no bonus was received.
>
> " * * * Upon a full and fair charge and on evidence fully sustaining the verdict, the issue the pleadings presented, whether a cash bonus was

paid for the Patterson leases, was submitted to the jury and found against plaintiffs. In addition, the jury found that the Patterson leases had no cash bonus value."

Again at R. 483, 131 Fed. (2d) 1000:

"Defendant denied both that it had received anything by way of bonus for the Patterson leases except the contingent bonus agreement of $3500.00 for each well drilled, and that these leases had any bonus value, and set out fully the facts of the transaction between it and Aloco. There was a trial to a jury with a motion by plaintiffs for a directed verdict for 400/15,486 of the cash consideration paid, and the overriding royalties and rights accrued and to accrue to the defendant under the agreement with Aloco. The motion overruled, there were jury findings fully supported by the evidence; that the $441,445.72 paid The Texas Company by Aloco was not bonus but consideration for the 17 completed oil well on lands other than plaintiffs'; that no bonus was paid for the leases on plaintiffs' land; and that they were without bonus value."

Respondent's pleading shows that if the Patterson land should, perchance, be found to contain oil in paying quantities, it will gladly pay petitioners their share of the $3500 per well to be paid by Aloco for wells drilled by Aloco on the Patterson land, R. 59. Wynne, President of Aloco, R. 111, testified that Aloco would be delighted to drill on the Patterson land and pay the $3500 per well if they could get oil, R. 124-125. Cole, for respondent, R. 198, testified that it would require Aloco to drill on the Patterson lands

if conditions should warrant and would share with petitioners the $3500 per well on the Patterson land and had so advised petitioners, R. 261-263.

———o———

The petition attempts to assert that the Circuit Court of Appeals rendered a decision in conflict with the local rule of law and property in Texas as to what constitutes royalty for an oil and gas lease on Texas land and thus disallowed petitioners a recovery of one-fourth of the share of the product mined or share of the profits reserved by respondent.

But the Circuit Court of Appeals is certainly not in conflict with the local rule of Texas. The Circuit Court of Appeals fully and correctly recognized the Texas rule, viz.: Where, as here, lessor may be paid a share of the product mined or a share of the profits, or either or both, and such payment may continue *through the term of the lease*, such payment constitutes royalty,—the determining feature being the possible continuation of the payment *through the term of the lease.* This rule is made clear by the Texas Supreme Court in *State National Bank of Corpus Christi v. Morgan*, 135 Texas 509, at page 517, 143 S. W. (2d) 757, at page 761. The opinion of the Texas Supreme Court explains the case of *Sheppard v. Stanolind Oil & Gas Company*, 125 S. W. (2d) 643.

In the case at bar the Circuit Court of Appeals cites and quotes from the opinion of the Texas Supreme Court in *State National Bank of Corpus Christi v. Morgan*, R. 485-486, (131 Fed. (2d) 1001).

The Circuit Court of Appeals held, R. 485, 131 Fed. (2d) 1001:

> "In the face of these findings that no cash bonus was received for the leases and that they had no cash bonus value, it would be in complete contradiction of the verdict for the court to award plaintiffs a recovery. Appellant's claim that the overriding royalties reserved are bonus and not royalty is no better founded. These reservations of a share of the product or the profit, or both, continue throughout the term of the lease, and, therefore, come strictly within the accepted definition of 'royalty' as 'a share of the product or profit reserved by the owner for permitting another to use the property.' " Citing cases, including *State National Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S. W. (2d) 757, 761.

The petition also attempts to assert or suggest that the decision of the Circuit Court of Appeals for the Fifth Circuit in the case at bar conflicts with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Wright v. Bush*, 115 Fed. (2d) 265, on the same matter. But the petition does not point out that the Court for the Tenth Circuit in the cited case had before it the local law of Kansas regarding an oil and gas lease on land in Kansas. No such question is involved in the instant case. The same matter was not before the two courts.

The petition makes the general charge that respondent has been guilty of fraud. There is not a scintilla

of evidence which raises the faintest whisper of support for this asseveration and it is utterly without merit.

———o———

In 1936 Mineral Investing Corporation, a wholly owned subsidiary of respondent, bought 31/32 of the oil, gas and other minerals in the Patterson land without making tests thereon, R. 145, and paid $14,400.00, R. 185. In 1937 Mineral Investing Corporation was dissolved and its assets conveyed to respondent. R. 366-369. The deed from petitioners to Mineral Investing Corporation contained the following, R. 37-39:

> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to lease said land for oil, gas or mineral purposes but should the Mineral Investing Corporation, its successors or assigns, lease said land for oil, gas or mineral purposes, then one-fourth (1/4) of the bonus paid for said lease and one-fourth (1/4) of the rentals paid under said lease shall be paid to the Grantors herein, their heirs or assigns, as a part of the consideration for this conveyance. It being understood that the amount of bonus, rentals and royalties for which the Mineral Investing Corporation may execute a lease shall be at its sole discretion.
>
> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to drill or mine for oil or gas or other minerals, but that such mining or drilling, both before and after production, shall be wholly at the option of said Grantee, its successors or assigns. However, should oil, gas or any other minerals be produced from said premises in paying

quantities by the Mineral Investing Corporation, its successors or assigns, then there shall be paid to Grantors, their heirs or assigns, as their interest may appear, a royalty of one-thirty-second (1/32) of the interest hereby conveyed in all oil, gas and other minerals, whether similar or dissimilar, produced and saved by said Grantee, its successors or assigns, free of the cost of production, as part of the consideration for this conveyance; the Mineral Investing Corporation, its successors or assigns, having free use of oil and gas for fuel for operations conducted on said premises."

By 1938 respondent had acquired oil, gas and mineral leases on a number of other tracts of land in Yoakum County, Texas; these other tracts are called "leased lands"; respondent also owned the full fee simple title to yet other tracts in that county, or to oil, gas and minerals therein, and these we term "fee lands". R. 51-53. The seventeen oil wells had been drilled on certain of these lands.

There was nothing on the Patterson land; by this time it was reasonably certain that the Patterson land was dry and it was virtually condemned. However, further drilling was indicated on some of the Yoakum County lands which would require large expenditures. But respondent was faced with the necessity of expending large sums of money in its operations in Illinois, in Colombia and on Bahrein Island. Respondent therefore cast about to sublease these lands in Yoakum County and many prospective or possible purchasers were interviewed in an effort to make the best possible trade. R. 200-201. Finally a trade was made with

the Aloco Oil Company, R. 202 et seq., which resulted in the Texas-Aloco Agreement.

Both Mr. Cole, who acted for The Texas Company, and Mr. Wynne, who acted for Aloco Oil Company, knew that the two and one-half sections of Patterson lands had no present leasehold value because they were practically condemned as dry,—they were "thrown in" merely so that The Texas Company and petitioners could get a little revenue in the way of delay rentals, one-fourth of which went to petitioners. R. 175.

It was desirable that Aloco have record leasehold estates in the lands and inasmuch as some of the Patterson lands were "fee lands" it was necessary that they be assigned to a third party who could execute to The Texas Company a lease thereon and it could then sublease to Aloco, as in the case of all the other lands included in the deal. Hence the conveyance to Tom T. Freeman, Trustee, was made so that he could execute a lease to The Texas Company and Aloco could be vested with a leasehold estate in the Patterson lands in line with the character of estate it acquired in other lands. R. 171.

If conditions should so change as to make it prudent to drill on the Patterson lands, Aloco could drill one well to 40 acres, or 40 wells, for each of which it would pay the deferred contingent bonus of $3500. This would amount to $140,000.00, of which petitioners would obtain $36,250.00 in addition to their 1/32 reserved interest in the oil. Testimony Mr. Wynne, R. 124, 125. If Aloco should drill wells on the Patterson lands the oil will be run into separate tanks—the oil

from each lease is run into its own tank, R. 225. If perchance it should develop that there is any reasonable prospect that the Patterson lands contain oil sufficient to justify drilling, Aloco will be required to promptly drill thereon. Testimony H. S. Cole, R. 261 et seq.

SPECIFICATION OF ERRORS

We have no specification of errors by petitioners to aid us. We suppose that petitioners seek to assert in substance that the Circuit Court of Appeals for the Fifth Circuit has erroneously refused to observe the local rule of law as to what constitutes royalty and bonus for an oil and gas lease on lands in Texas, thereby disallowing petitioners the recovery sought by them.

SUMMARY OF THE ARGUMENT

POINT I.

Patterson land had no bonus value and no bonus paid for leases on it.

POINT II.

Petitioners will share in $3500 to be paid by Aloco for any paying well it drills on Patterson land.

POINT III.

No conflict with applicable decisions of Supreme Court of Texas on question of local law as to what constitutes royalty under an oil and gas lease on Texas land.

POINT IV.

No conflict with decision of the Circuit Court of Appeals for the Tenth Circuit on same matter.

ARGUMENT

POINT I.

The jury found by their verdict that no bonus was paid for the leases on the Patterson land, that said land had no bonus value and that the $441,445.72 paid respondent by Aloco was not bonus but consideration for the 17 completed oil wells on lands other than petitioner'. R. 87-89. The Circuit Court of Appeals approved the verdict. R. 483.

We hardly think it necessary to go behind the jury verdict, but, if so, we say:

There was ample and convincing evidence that the Patterson land had no bonus value, that no bonus was paid for it and that the $441,445.72 was paid for said improvements on land other than the Patterson land, R. 117, 119, 122-123, 217, 220, 221-226.

POINT II.

If Aloco should drill wells on the Patterson land and produce oil in paying quantities it will be required to pay $3500 for each of said wells and petitioners will receive one-fourth thereof as a matter of course. No one disputed this; there is no controversy about it.

POINT III.

The Circuit Court of Appeals did not deviate from the local law in respect of royalty under an oil and gas lease on Texas land. A comparison of the opinion of the Circuit Court of Appeals in the case at bar, pages 485-486 of the printed record, (131 Fed. 2d at page 1001), with the opinion of the Supreme Court of Texas in *State National Bank of Corpus Christi v. Morgan*, at pages 514-17 of 135 Texas Reports (143 S. W. (2d) 757 at pages 760, 761), shows there is no basis for supposing any conflict.

In *State National Bank of Corpus Christi v. Morgan*, supra, it is pointed out and held:

Royalty and bonus in Texas each constitutes consideration for the making of an oil and gas lease, as

does also delay rental, but that does not not make them identical. Bonus is a convenient term applied indiscriminately to consideration for the lease over and above the usual 1/8 royalty, but that does not mean that royalty becomes bonus merely because it happens to be more than 1/8. Royalty is a share of the product or profit continuing through the *term of the lease.* Royalty may be, and quite frequently is, more than 1/8, but that does not change its nature. It remains royalty even though it is more than the usual in amount.

In the case at bar the Circuit Court of Appeals followed the rule stated by the State Supreme Court in the cited case.

As held by the Court, R. 485, 131 Fed. (2d) 1001:

> "These reservations of a share of the product or the profit, or both, continue throughout the term of the lease, and, therefore, come strictly within the accepted definition of 'royalty' as 'a share of the product or profit reserved by the owner for permitting another to use the property.' "

And, of course, the Circuit Court of Appeals in the case at bar does not conflict with the decision of the Texas Court of Civil Appeals in *Sheppard v. Stanolind Oil & Gas Co.*, 125 S. W. (2d) 643; that case is cited and explained by the Supreme Court of Texas in *State National Bank of Corpus Christi v. Morgan*, at pages 514, 515, 518 of 135 Texas Reports, pages 760, 762 of 143 Southwestern Reporter, Second Series.

POINT IV.

There can be no conflict between the Tenth Circuit in *Wright v. Bush*, 115 Fed. (2d) 265, and the Fifth Circuit in the case at bar, because the two courts did not have the same matter before them. The Court for the Tenth Circuit was not concerned with the local rule of law in Texas as to what constitutes royalty or bonus for an oil and gas lease on Texas land, nor was the Court for the Fifth Circuit concerned with a like question in respect of Kansas land.

———o———

It is now apparent, we think, that as a whole petitioners' case is without merit. It is based upon the extraordinary idea that they should be awarded a share in something in which they never had the slightest interest and thus be permitted to reap where they have not sown. There is no occasion for granting the writ of certiorari.

Respondent prays that the petition be denied.

HERBERT S. GARRETT,
DURWOOD H. BRADLEY,
WALTER D. WILSON,
Attorneys for Respondent,
The Texas Company.